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In re Application of
Kreamer
Application No. 08/071,052
Filed: 4 June, 1993
Attorney Docket No. 467312465

ON PETITION

This is a decision on the petition filed herein on 13 June, 2000, under 37 C.F.R. §1.137(a),¹ and supplemented on 3 August, 2000, under 37 C.F.R. §1.137(b),² to revive the above-identified application.

The petition under §1.137(b) is **GRANTED**,³ the petition under §1.137(a) is **dismissed as moot** for failing to satisfy the evidentiary burden under the rule.⁴

The record indicates that:

- the application became abandoned for failure to reply timely within the one- (1-) month shortened statutory period (SSP) to a restriction requirement mailed on 19 August, 1999, and due on or before 19 September, 1999;

¹ A Petition filed under the provisions of 37 C.F.R. §1.137(a) must be accompanied by:

(1) The required reply, unless previously filed. In a nonprovisional application abandoned for failure to prosecute, the required reply may be met by the filing of a continuing application. In an application for patent, abandoned or lapsed for failure to pay the issue fee or any portion thereof, the required reply must be the payment of the issue fee or any outstanding balance thereof;
(2) the petition fee required by 37 C.F.R. §1.17(l);
(3) A showing to the satisfaction of the Commissioner that the entire delay in filing the required reply from the reply due date until the filing of a grantable petition pursuant to the is paragraph was unavoidable; and
(4) Any terminal disclaimer (and fee set forth in 37 C.F.R. §1.20(d)) required pursuant to 37 C.F.R. §1.137(c).

² Effective December 1, 1997, the provisions of 37 C.F.R. §1.137(b) now provide that where the delay in reply was unintentional, a petition may be filed to revive an abandoned application or a lapsed patent pursuant to 37 C.F.R. §1.137(b). A grantable petition filed under the provisions of 37 C.F.R. §1.137(b) must be accompanied by:

(1) the required reply, unless previously filed. In a nonprovisional application abandoned for failure to prosecute, the required reply may be met by the filing of a continuing application. In an application or patent, abandoned or lapsed for failure to pay the issue fee or any portion thereof, the required reply must be the payment of the issue fee or any outstanding balance thereof.
(2) the petition fee as set forth in 37 C.F.R. §1.17(m);
(3) a statement that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to 37 C.F.R. §1.137(b) was unintentional. The Commissioner may require additional information where there is a question whether the delay was unintentional; and
(4) any terminal disclaimer (and fee set forth in 37 C.F.R. §1.20(d)) required pursuant to 37 C.F.R. §1.137(c).

³ Petitioner authorizes charges and credits to Deposit Account 12-2250 as necessary herein, and said account is charged \$605.00 for the instant petition under 37 C.F.R. §1.137(b) and credited \$55.00 for the petition under 37 C.F.R. §1.137(a).

⁴ An application is "unavoidably" abandoned only where Petitioner (or Petitioner's counsel) takes all action necessary for a proper response to the outstanding Office action, but through the intervention of unforeseen circumstances, the response is not timely received in the Office. That is, in the context of ordinary human affairs the test is such care as is generally used and observed by prudent and careful persons in relation to their most important business. Ex parte Pratt, 1887 Dec. Comm'r Pat. 31 (Comm'r Pat. 1887); Ex parte Henrich, 1913 Dec. Comm'r Pat. 139, 141 (Comm'r. Pat. 1913). The petition recitation (see: infra) as the basis for unavoidable delay is completely unsupported by documentary evidence and declaration(s), fails to satisfy the test set forth in Pratt, and, thus, the petition cannot be affirmatively decided under the unavoidable standard.

- the application went abandoned after midnight on 19 September, 1999;⁵ and
- the Notice of Abandonment was mailed on 8 May, 2000.

The Terminal Disclaimer filed 13 June, 2000, is accepted, and the term disclaimed is eleven (11) months, which is equivalent to the period of abandonment.

The file is being sent to Technology Center 1600 for further processing.

Telephone inquiries concerning this matter may be directed to Petitions Attorney John J. Gillon, Jr. at (703) 305-9199.



Beverly M. Flanagan
Supervisory Petitions Examiner
Office of Petitions
Office of the Deputy Commissioner
for Patent Examination Policy

⁵ As a basis for unavoidable delay under 37 C.F.R. §1.137(a), Petitioner alleges that:

On [5 November, 1999] we received an Office action with the cover sheet missing PTO-90C. The response to the action received on [5 November] was a restriction requirement and was filed via facsimile on [30 November, 1999]. Operating with the understanding that the mailing date was early November 1999, the November filing was thought to be a timely response to the Office action. However, on [12 May, 2000], we received a Notice of Abandonment stating that the response was late and without a Petition to Extend the time to Answer and the required fee. On [7 June, 2000], we learned from Examiner Criares that the actual mailing date of the Office action was [19 August, 1999]. As such the time to respond to the action had already expired by the time we received it in November.

Based on the foregoing, the entire delay in replying to the original action was unavoidable due to the unforeseen fault or imperfection of the U.S. Postal Service, or the U.S. PTO, in delivering and/or mailing the original action. All actions in response to the Office action were timely and diligent and did not lead to the abandonment.

It is notable that: (1) the cover sheet to which Petitioner refers is the only location in the Office action in which the delivery address for the paper is set forth, and, in the absence of the cover sheet, delivery (whether timely or untimely) would be unlikely; (2) extensions of time were available to, but unused by, Petitioner to obtain and assure timely response to the restriction requirement; and (3) in satisfaction of the Pratt test (see: Fn. 3, above), one pursuing a matter in a fashion concordant with the handling one's most important business affairs might be expected to contact the Examiner and/or the Examiner's supervisor immediately upon receipt of a partial paper.